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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| SAUL DELEON,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>AIRTOUCH CELLULAR,<br><br>Defendant and Respondent. | B234737<br><br>(Los Angeles County<br>Super. Ct. No. BC389065) |

APPEAL from an order of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Initiative Legal Group, G. Arthur Meneses, Katherine W. Kehr; Capstone Law, Miriam Schimmel, Glenn A. Danas, Katherine Den Bleyker and Robert K. Friedl for Plaintiff and Appellant.

Jones Day, Deborah C. Saxe and Brian M. Jorgensen for Defendant and Respondent.

Saul Deleon, for himself and as class representative, appeals from the trial court's denial of class certification of wage-related claims against his former employer, Airtouch Cellular, doing business as Verizon Wireless (Verizon Wireless).[1] The trial court denied certification before the California Supreme Court decided *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). Deleon contends that in light of *Brinker*, the trial court's order denying class certification was based on erroneous legal assumptions regarding the timing of meal periods and rest breaks, and the order also was based upon improper criteria.

We conclude the trial court's denial of the meal period subclasses, including those nonexempt California employees claiming they were provided a late meal period or denied a second meal period, is not based upon erroneous legal assumptions but is consistent with *Brinker*, *supra*, 53 Cal.4th 1004 and supported by substantial evidence. On the question of rest break subclass certification, we conclude that appellant waived any claim that the trial court's decision is based on an erroneous legal assumption regarding the timing of rest breaks, and the trial court did not abuse its discretion in concluding common issues do not predominate. With respect to the contested subclass seeking unreimbursed business expenses incurred while participating in the company's concession phone program, the trial court's decision to deny class certification is not based upon improper criteria. Accordingly, we affirm.

FACTS

Verizon Wireless operated 137 retail stores in California and employed 5,481 nonexempt retail employees during the relevant period. Verizon Wireless has company-wide policies applicable to all its retail stores and maintains a centralized timekeeping system (VZWTime). VZWTime keeps track of when nonexempt retail sales employees in California take their meal periods, assuming they clock out, but does not keep track of paid rest breaks.

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[1] This is our third opinion in this action. In the first two opinions, we referred to the defendant as "Verizon Wireless," and for the sake of consistency, we continue to do so in this opinion.

Verizon Wireless employees who staff retail stores and kiosks are nonexempt, with the exception of the store manager. The number of employees varies from store to store, and stores are staffed depending on the size and type of store. There must be a store manager or assistant store manager on duty at each store at all times when the store is open and enough employees to cover employee breaks and to attend to the customers. Company policy also requires that at least two employees work at all times when the retail kiosk is open to the public. At issue in this class action is the company's meal period and rest break policy, and its concession phone program that provides certain employees with cellular phones.

1. *Companywide Meal Period and Rest Break Policy*

The company's policy is to provide every nonexempt California employee one meal period for every five hours of work and one rest break for every four hours of work. An optional form used to schedule meal periods and rest breaks states: "Every retail store employee (other than the store manager) is entitled to one meal break for every 5 hours of work and one rest break for every 4 hours of work. Meal breaks must begin before the start of the 6th hour of work and must be at least 30 minutes long. Rest breaks must be at least 10 minutes long (although Company policy allows for 15 minute rest breaks). Employees who work more than 10 hours in a day are entitled to second meal breaks. Depending on the circumstances, employees who miss meal/rest breaks may be entitled to an extra hour of pay at their regular rates of pay."

The company's meal period and rest break policy is further explained in its employee online training program in a question and answer format. The company material specifically states: "Your lunch must begin before more than 5 hours have been worked. Put differently your lunch must begin before the start of your 6$^{th}$ hour of work."

Since February 2004, VZWTime was been programmed to automatically pay premiums for unrecorded meal periods, and for meal periods lasting less than 30 minutes. From February 2004 to July 2007, however, VZWTime was not automatically programmed to pay premiums for a late meal period, or for a second missed meal period in cases where the first meal period was taken. In July 2007, VZWTime was

programmed to trigger the payment of meal period premiums to employees who did not record a meal period of at least 30 minutes for a shift greater than five hours.

In addition to its policies, all Verizon Wireless retail stores posted a copy of the Industrial Welfare Commission (IWC) Wage Order 7-2001 (Cal. Code Regs., tit. 8, § 11070)[2] (Wage Order No. 7), and the retail kiosks had a copy of Wage Order No. 7 in a binder accessible to employees. Wage Order No. 7 states that no employer "shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee." (Wage Order No. 7, subd. 11(A).) With respect to rest breaks, Wage Order No. 7 states that employees receive 10 minutes for each four hours of work or "major fraction thereof." (*Id.*, subd. 12(A).)

2. *Concession Phone Program*

In 2002, Verizon Wireless implemented its "Concession Account Program," to provide eligible employees with cellular phones. Initially, nonexempt employees, including assistant store managers, supervisors, and full-time retail sales representatives could elect to participate in the program, and if they did so, they received handsets and cell phone service at no charge. Participants could use the phones for business or personal use. Between 2004 and 2009, participants paid for 411 calls and certain downloads. But, since 2009, the company gives participants a monthly allotment. If the participant exceeds the monthly allotment, he or she is subject to discipline. Full-time retail sales representatives were eligible to participate in this program.

In 2004, Verizon Wireless launched a "Retail 1500 Plan" for full- and part-time retail sales representatives. Based upon a use survey, the company provided 1,500 free

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[2] The IWC issues wage orders on an industry-by-industry basis. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 57.) In *Brinker*, the California Supreme Court interpreted Wage Order No. 5, applicable to restaurant workers. (*Brinker*, *supra*, 53 Cal.4th at p. 1027 & fn. 7.) Wage Order No. 7 contains similar meal period and rest break timing requirements.

local minutes for personal and business use. At their option and expense, retail sales representatives could sign up for additional services. Because the plan was designed to cover all business usage, retail sales representatives were not permitted to submit expense reports for business calls if they exceeded their minutes. The company material explains: "As the pricing was designed to accommodate business usage requirements, any business charges incurred will not be expensed and will be the responsibility of the employee. These charges include bill proration, monthly taxes, Get It Now downloads, etc." If a retail sales representative incurred additional business expenses, he or she had to ask the store manager to make an adjustment and credit for business use.

PROCEEDINGS

1. *Class Action Complaint*

Deleon was a nonexempt retail sales representative, and his second term of employment began in August 2004 and ended in April 2005. He worked at Verizon Wireless retail kiosks in Circuit City stores. While employed, he participated in the company's concession phone program. Deleon filed for himself and as class representative for all others similarly situated a class action complaint against Verizon Wireless, alleging meal period and rest break violations, and seeking unreimbursed business expenses incurred as a participant in the company's concession phone program.[3]

The meal period causes of action are based on the timing of the first meal period and the failure to provide a second meal period. The class action complaint alleged that Verizon Wireless violated Labor Code section 512, subdivision (a)[4] because Deleon and

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[3] The first amended class action complaint was consolidated with Los Angeles Superior Court proceedings *Aleman v. Verizon Wireless Corp*., filed April 2007, and *Harrison v. Air Touch Cellular*, filed in December 2007. Another case, *Budagyan v. Airtouch Cellular*, filed April 2009, was deemed related to the consolidated action.

[4] Labor Code section 512, subdivision (a) states: "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the

members of the putative class worked for a period of longer than six hours and were required to work in excess of five hours without a meal period. It was further alleged that Verizon Wireless violated Labor Code section 512, subdivision (a) because Deleon and members of the putative class who were scheduled to work 10 hours did not receive a second meal period.

The rest break cause of action alleged that Verizon Wireless violated Labor Code section 226.7,[5] by requiring Deleon and the putative class to work in excess of four hours before taking a 10 minute rest break, and to work an additional four hours without providing a second 10 minute rest break.

As for the unreimbursed concession phone expenses, Deleon and the putative class alleged that Verizon Wireless violated Labor Code section 2802, subdivision (a)[6] when it required Deleon "and other members of the class to pay money to obtain Verizon cellular phone service and equipment during the relevant time period."

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employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

[5] Labor Code section 226.7, subdivision (a) states: "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission."

[6] Labor Code section 2802, subdivision (a) provides in pertinent part: "(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ."

2. *The Certification Motion*

Deleon moved to certify five subclasses, only four are at issue in this appeal, for which he maintained common questions of law and fact predominated over individual questions.[7] The four subclasses include: (1) late meal period subclass of employees who worked more than five hours and did not receive a 30-minute meal period; (2) missed second meal period subclass of employees who worked 10 hours and did not receive at least two 30-minute meal periods; (3) missed rest break subclass of employees who did not receive rest breaks;[8] and (4) unreimbursed concession phone expenses subclass of employees who incurred expenses arising from Verizon Wireless's concession phone program.

a. *Late Meal Period, Missed Second Meal Period, and Rest Break Subclasses*

In support of and in opposition to the class certification motion, the parties presented declarations from the putative class members, declarations from company representatives, and excerpts of deposition testimony. In addition, Deleon presented the declaration of a mathematics and statistics expert, Dr. Robert Fountain, who analyzed Deleon's time records, along with a sampling of nonexempt employees' records.

Deleon stated in his declaration: "As a result of the demands of my work, and due to Verizon's inability to sufficiently staff its stores, at times, I took my meal breaks more than five hours into my shift." When Deleon worked more than 10 hours, he stated "at times" he "would not get the chance to take a second meal break of at least 30 minutes because of work-related issues." With respect to rest breaks, Deleon stated: "I was at

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[7] Deleon withdrew his motion to certify an additional class of nonexempt employees who were not reimbursed for automobile mileage expenses.

[8] The class action complaint and the proposed definition of the rest break subclass did not advance the theory of liability stressed in the opening brief, that is, the rest break policy facially violated the law because it fails to give full effect to the "major fraction thereof" language of Wage Order No. 7, subdivision 12(A). (See *Brinker, supra*, 53 Cal.4th at p. 1033.)

times unable to take any rest breaks. During my employment, customer service demands and understaffing at times prevented me from being able to take my rest breaks."

The motion also included 22 declarations from putative class members and was supplemented with an additional 30 declarations. Deleon cites to these additional declarations in which the declarant states that understaffing and high customer demand frequently caused missed, late, or shortened meal periods and rest breaks. Ryan Hooper, for example, stated: "During my employment with Verizon Wireless, based on my best recollection at this time, I have also sometimes been denied off-duty rest breaks of at least ten minutes." Michael Lopez signed a declaration stating that based upon his best recollection he was sometimes denied off-duty rest breaks, and his rest breaks were "cut short because the store got busy." And Roger Hummel stated that if he complained regarding his missed rest break, his supervisor would tell him that they were understaffed and needed his help. Hooper, Lopez, and Hummel also stated that they were denied off-duty meal periods, and sometimes, or to the best of their recollection, they worked in excess of five hours before their meal period.

Fountain's review of Deleon's time and wage records revealed he worked 132 shifts of six hours or more, and of these shifts, 31 show that he recorded a meal period that began "after the fifth hour." Deleon worked five shifts of 10 hours or more, in which he did not record a second meal period. Deleon received three hours of additional pay for "California Meal Time."

In response, Verizon Wireless countered that there was no company-wide policy of failing to provide a timely first meal period, no company policy to deny a second meal period, and no company policy to deny rest breaks or to understaff to prevent employees from taking meal periods or rest breaks. Moreover, Verizon Wireless maintained there was no method of common proof to certify these subclasses. For example, with respect to the late meal period subclass, the court would have to consider if the time records were accurate, and if so, whether or not the employee waived the right to a timely meal period, or whether the employee voluntarily took a late meal period. Because employees did not record their rest breaks, whether a rest break was provided, and if so, why the employees

did not take their rest breaks would be individualized questions of fact not susceptible to class treatment.

b. *Unreimbursed Concession Phone Expenses Subclass*

Citing to the uniform policy of not reimbursing employees for all business expenses incurred in relation to the company's concession phone program, Deleon and the putative class he sought to represent contended common issues predominated because this policy violated Labor Code section 2802. Deleon stated: "I do not recall Verizon ever paying these expenses, or reimbursing me for any expenses I was billed for the mobile device's use." In addition, participants submitted declarations stating they were not reimbursed for taxes, data plans, and overages.

Verizon Wireless submitted Deleon's December 2004 invoice in which Deleon was charged for a 411 connect and a long distance call. As the company argued, whether he made these calls for a business purpose would constitute an individual inquiry, not subject to common proof.

3. *The Trial Court Denied Class Certification Before* Brinker

After a hearing, the trial court adopted its tentative decision (with certain modifications not at issue here) and denied class certification. The trial court concluded, with respect to all subclasses, there was no commonality. The trial court also concluded that the meal period subclasses and rest break subclass claims lacked typicality and superiority.

With respect to the meal period and rest break subclasses, the trial court's order states: "In this Court's view *Lamps Plus Overtime Case* (May 10, 2011) 2011 Cal.App.LEXIS 565,[9] is a correct statement of the controlling law, as are *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1088-89, and *Kenny v.*

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**9** In *Lamps Plus Overtime Cases* (2011) 195 Cal.App.4th 389, review granted July 20, 2011, S194064 (*Lamps Plus I*), the court concluded "employers must provide employees with breaks, but need not ensure employees take breaks, that individual disputes dominated all of plaintiffs' claims, and the class representatives were inadequate." (*Lamps Plus Overtime Cases* (2012) 209 Cal.App.4th 35, 41, review den. and opn. ordered nonpub. (Dec. 12, 2012, S206007).)

*Supercuts, Inc*. (N.D.Cal. 2008) 252 F.R.D. 641, 645. *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, and *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, are both confined to their peculiar facts. . . . Based on a correct statement of the law regarding when and how non-exempt employees need to be afforded the chance to take authorized breaks, the individual fact issues would vastly predominate over any matters allegedly involving a common policy and there would be no superiority in litigating these claims on a class basis . . . ."

As for the unreimbursed concession phone expenses subclass, there would be "no systemic way of determining whether or not each individual expense (i.e. text, phone call, download, etc.) was for business or personal use without individualized inquiry." The court continued: "[f]or excess minutes especially, it would be a daunting task to determine (for one individual, let alone a class) whether each call was necessary for business."

Deleon timely appealed.[10]

DISCUSSION

1. *Appellate Review of Class Certification Orders*

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.]" (*Brinker, supra*, 53 Cal.4th at p. 1021; see also Code Civ. Proc., § 382.) The community of interest requirement embodies three factors: " '(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' " (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) "To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' [Citation.] It must determine whether

[10] The denial of a request for class certification is appealable. (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699.)

the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Brinker*, *supra*, at p. 1024.)

"The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion . . . . A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]" (*Fireside Bank v. Superior Court*, *supra*, 40 Cal.4th at p. 1089.) "A grant or denial of class certification that rests in part on an erroneous legal assumption is error; without regard to whether such a certification might on other grounds be proper, it cannot stand. [Citation.]" (*Brinker*, *supra*, 53 Cal.4th at p. 1050.)

2. *Attacking the Trial Court's Reliance on* Lamps Plus I *in Light of* Brinker

Appellant contends the trial court's legal analysis was flawed because it relied on the now depublished *Lamps Plus I* to deny class certification of the late meal period and rest break subclasses. This argument is based upon the erroneous belief that *Lamps Plus I* is inconsistent with *Brinker*, *supra*, 53 Cal.4th 1004.[11] It is not.

*Brinker* determined, among other things, that "[a]n employer's duty with respect to meal breaks under both [Labor Code] section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. . . . [¶] [T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the

[11] Appellant requested judicial notice of the petition for review in *Brinker*. Because we have the Supreme Court's answer to the issues raised in the petition, we deny that request as it is unnecessary to resolve the issues presented in this appeal.

employer in violation of its obligations . . . ." (*Brinker, supra*, 53 Cal.4th at pp. 1040-1041.)

Appellant repeatedly argues the depublication of *Lamps Plus I* cast doubt on the trial court's rationale in denying class certification. Here, the trial court agreed with the *Lamps Plus I* court's reasoning, and the appellate court's analysis made sense to the Supreme Court when it concluded that an employer need only provide a meal period, not ensure that employees take their meal periods. (*Brinker, supra*, 53 Cal.4th at pp. 1040-1041.) *Lamps Plus I* did not decide the issues raised in *Brinker* related to the timing of the first meal period, or the amount of rest time that must be authorized, and the timing of rest periods. Cases are not authority for propositions not decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.)

Appellant also contends that *Brinker* highlights the trial court's legal error in rejecting *Cicairos v. Summit Logistics, Inc., supra,* 133 Cal.App.4th 949, and *Jaimez v. Daiohs USA, Inc., supra*, 181 Cal.App.4th 1286, asserting this is "integral to *Brinker's* reasoning." These appellate court cases are cited by the Supreme Court in *Brinker* for the proposition that "an employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." (*Brinker, supra*, 53 Cal.4th at p. 1040.) We find no legal error in the trial court's analysis of these cases, or the trial court's understanding of the law related to an employer's obligation to provide meal periods.

3. *Certification of the Late Meal Period Subclass*

a. *The Trial Court Did Not Rely on an Erroneous Legal Assumption*

Appellant contends the trial court's order denying certification of the late meal period subclass must be reversed because *Brinker* confirms that Verizon Wireless's meal period policy is a facial violation of Labor Code section 512.[12] *Brinker* does not hold, as

[12] Appellant cites to select portions of the trial court's remarks during argument on the motion, discussing its view regarding the timing of meal periods. Appellant contends the trial court rejected this theory of "timing-based liability." The trial court's remarks did not reflect its ruling on the class certification motion. The trial court denied

appellant suggests, that the first meal period must be provided by the beginning of the fifth hour of a standard eight-hour shift.

*Brinker* concluded that Labor Code section 512 requires a first meal period "no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." (*Brinker, supra,* 53 Cal.4th at pp. 1041-1042, 1049.) Stated another way: "the statute requires a first meal period no later than the start of an employee's sixth hour of work." (*Id.* at p. 1041.)

Verizon Wireless's policy is consistent with *Brinker*. (*Brinker, supra*, 53 Cal.4th at pp. 1041-1042.) The policy states that lunch "must begin before more than 5 hours have been worked. Put differently, your lunch must begin before the start of your 6th hour of work." Thus, the trial court did not rely on an erroneous legal assumption.

b. *Common Issues Did Not Predominate*

The trial court denied certification of the late meal period subclass because common issues of proof did not predominate. Common issues predominate when they would be "the principal issues in any individual action, both in terms of time to be expended in their proof and of their importance." (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 810.) Substantial evidence supports the trial court's determination.

There was no evidence of company-wide practice that store managers and assistant store managers who scheduled meal periods violated Verizon Wireless's meal period policy. To the extent there was evidence that some employees took late meal periods, they did so for a variety of individual reasons, including, for example, working through lunch to earn more commissions or to run errands at a later time. For every late meal period, there must be an individualized inquiry to determine whether the time records actually reflect when the meal period was "provided," not when it was taken. Individual questions are more likely to predominate if the employer's obligation is to

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certification of this subclass because, among other reasons, common questions did not predominate. A trial court's oral comments may sometimes be illustrative, but they may never be used to impeach the order or judgment on appeal. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268.)

offer meal periods, not ensure employees take their meal periods. Because substantial evidence supported the trial court's conclusion that these claims were not amenable to resolution on a class-wide basis, there was no abuse of discretion in denying certification of the late meal break subclass.

4. *Certification of the Second Meal Period Subclass*

Appellant contends the trial court abused its discretion in denying certification of the second meal period subclass because Verizon Wireless had a corporate practice of not paying premiums mandated by Labor Code section 226.7, subdivision (b) [13] with respect to a second meal period violation. This is an attack on the automatic programming (or lack thereof) of the VZWTime system, which is not a basis for liability. "The 'additional hour of pay' provided for in subdivision (b) is the legal remedy for a violation of subdivision (a), but whether or not it has been paid is irrelevant to whether section 226.7 was violated." *(Kirby v. Immoos Fire Protection, Inc*. (2012) 53 Cal.4th 1244, 1256.)

The company's policy states: "If you work more than 10 hours in a day, you're entitled to a second meal period." There was evidence presented that store managers and assistant store managers scheduled and provided second meal periods to employees who worked a shift of more than 10 hours. Deleon states in his declaration that "at times," he "would not get the chance" to take a second meal period, raising individualized inquiries. Deleon does not say the company had a policy or practice of failing to provide a second meal period. Like all the other putative class members, individual issues predominate as to whether there was some reason that each store or retail kiosk did or did not provide a second meal period, and whether the putative class member had a reason for not taking a second meal period.

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[13] Labor Code section 226.7, subdivision (b) states: "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided."

Appellant also contends that the trial court's conclusion is based on an erroneous legal assumption because *Brinker* instructs that the proper focus of inquiry at the class certification stage is whether violations occurred, not on why a violation occurred. This argument is based upon the false premise that the VZWTime records are accurate and show that a violation occurred. The VZWTime records only show that a second meal period was not taken, not whether the company did not provide a second meal period. Moreover, appellant overstates the case by mischaracterizing Justice Werdegar's concurring opinion as "reject[ing] the notion that such individualized 'why' questions preclude [class] certification." Justice Werdegar explained that the majority opinion she authored was not a per se bar to all meal period class actions, and the question why a meal period was missed does not render meal period claims "*categorically* uncertifiable." (*Brinker*, *supra*, 53 Cal.4th at p. 1053 (conc. opn. of Werdegar, J.).) As the majority opinion noted, an employer undermining a formal policy of providing meal periods by pressuring employees to perform their duties in ways that omit breaks would not require the resolution of individual issues. (*Id*. at p. 1040.) Here, however, because there is substantial evidence that individual issues predominate, the trial court did not abuse its discretion in denying class certification of the second meal period subclass.

5. *Certification of the Rest Break Subclass*

Appellant contends the trial court erred in denying the motion to certify the rest break subclass because, in light of *Brinker*, the trial court's decision is now based upon an erroneous legal assumption. In addition, appellant challenges the denial of certification, claiming the order does not comply with the law because it fails to address the theory of liability that there was a company policy of understaffing that denied employees a meaningful opportunity to take rest breaks.

a. *Timing of Rest Breaks Was Not Before the Trial Court*

Relying on *Brinker*, *supra*, 53 Cal.4th 1004, appellant contends that the Verizon Wireless rest break policy is a facial violation of Labor Code section 226.7 because it permits one rest break for every four hours of work. (See *Brinker*, at pp. 1028-1029.) This theory of liability relates to the rate at which rest time must be authorized and

permitted. Appellant did not move for certification on this theory and raises the issue for the first time on appeal. Appellant has waived any such claim by failing to raise it in the trial court. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767.) Appellant appears to argue that the issue pertains only to a question of law, which can be raised for the first time on appeal. (*Ibid.*) We are not required to consider this new theory, even if it is a pure question of law.

This theory could have been advanced before *Brinker*. *Brinker* acknowledged the Division of Labor Standards Enforcement (DLSE) had earlier adopted a similar interpretation of the rate at which rest time must be authorized and permitted. (*Brinker*, *supra*, 53 Cal.4th at pp. 1028-1029.) Thus, this court will not exercise its discretion and address the "new" theory presented in this appeal.

b. *Common Issues Did Not Predominate*

The trial court denied certification of the rest break subclass because this claim was not subject to common proof. As presented to the trial court, the theory of the liability was whether Verizon Wireless's "policies and practices concerning the staffing of its stores effectively denied or prevented employees from taking timely and uninterrupted rest breaks."

Unlike the employer in *Jaimez v. Daiohs USA, Inc.*, *supra*, 181 Cal.App.4th 1286, 1304, who scheduled deliveries that made it impossible for employees to take breaks and complete their deliveries, there was no evidence of a company-wide scheduling policy or staffing practice at Verizon Wireless that made it impossible for nonexempt employees to take rest breaks. The reason that an employee was or was not provided a rest break requires an individual inquiry into each store, each scheduled shift, peak hours and special events, and each employee's circumstances throughout the day that prevented him or her from taking a rest break at a less busy time during the day.[14]

[14] Appellant focuses on the "now de-published *Lamps Plus*" to also argue the trial court relied on an erroneous legal assumption in denying certification of the rest break subclass. This argument is unavailing. *Lamps Plus I* cited to *Brown v. Federal Express*

Appellant's argument that the trial court's order fails to specifically address the understaffing theory is not well taken. This theory of liability was presented in the motion to certify this subclass, and the trial court's order states: "Based on a correct statement of the law regarding when and how non-exempt employees need to be afforded the chance to take authorized breaks, the individual fact issues would vastly predominate over any matters allegedly involving a common policy . . . ." The trial court did not abuse its discretion in denying certification of the rest break subclass.

6. *Certification of the Unreimbursed Concession Phone Expenses Subclass*

Appellant contends the order denying certification of the unreimbursed concession phone expenses subclass must be reversed because the trial court employed improper criteria by reaching the merits of this claim. Specifically, appellant maintains the trial court's conclusion that the company's concession phone program provided free services ignored the theory of liability, that is, despite providing free services, the company's policy does not reimburse for all business expenses and is therefore a per se violation of Labor Code section 2802.

The trial court denied certification because this cause of action was not susceptible of common proof. As noted, "[t]o assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' [Citation.] It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence." (*Brinker*, *supra*, 53 Cal.4th at p. 1024.) When class certification depends upon a disputed threshold legal issues or factual questions, a court may, and indeed must resolve them. Here, the trial court appropriately decided the threshold legal issue, as no other means would permit assessment of whether class treatment was warranted.

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*Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 587, which addressed and rejected the understaffing theory presented here.

Labor Code section 2802, subdivision (a) states that an employer must reimburse employees "for all necessary expenditures" incurred by the employee in "direct consequence of the discharge of his or her duties." When an "employer either knows or has reason to know that the employee has incurred a reimbursable expense . . . it must exercise due diligence to ensure that each employee is reimbursed." (*Stuart v. RadioShack Corp*. (N.D.Cal. 2009) 641 F.Supp.2d 901, 903.) Labor Code section 2802 is subject to an anti-waiver provision. (Lab. Code, § 2804.)

The Supreme Court in *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, acknowledged that relatively few courts have construed or applied Labor Code section 2802. (*Gattuso v. Harte-Hanks Shoppers, Inc.*, at pp. 562-563.) In *Gattuso*, the issue was automobile reimbursement expenses, and whether an employer could satisfy the statutory obligation by paying employees increased wages or commissions instead of separately reimbursing them for their actual expenses. (*Id.* at pp. 559, 575.) Because calculation of actual expenses can be "burdensome for both the employer and the employee," an employer also is permitted to use a lump-sum payment method to reimburse employees provided the amount paid is sufficient to fully reimburse employees for the actual expenses necessarily incurred. (*Id*. at pp. 568, 570-571.) This reimbursement method is subject to the requirement that the "employee must be permitted to challenge the amount of a lump-sum payment as being insufficient under section 2802." (*Id.* at p. 571.) If the lump-sum payment is inadequate, the employer must make up the difference to satisfy its statutory obligations to fully reimburse employees for all expenses actually and necessarily incurred. (Lab. Code, §§ 2802, 2804.)

Although the concession phone programs are distinct from the automobile reimbursement plan at issue in *Gattuso v. Harte-Hanks Shoppers, Inc.*, the Verizon Wireless programs provided the equivalent of a lump-sum payment of business expenses. Further, the company provided an exception mechanism to seek approval for reimbursement of business expenses not covered under the program. Based upon the California Supreme Court's view of the statutory obligations in Labor Code section 2802,

the company's concession phone program would violate the law only if it were insufficient to provide full reimbursement for actual expenses necessarily incurred. (*Gattuso v. Harte-Hanks Shoppers, Inc.*, *supra*, 42 Cal.4th at p. 570.) Thus, to establish liability, Deleon and the putative class must show that the cellular phone services for which they seek reimbursement, for example, extra minutes above the 1500 local minute allocation in the Retail 1500 plan, were "necessary business expenses."[15]

Appellant faults the trial court for rejecting the putative class's trial plan to rely on the policy, employees' phone records, and statistical and survey analyses to determine whether the unreimbursed expenses were necessarily business related. The court did not abuse its discretion in rejecting this plan because, as noted, the company's liability for unreimbursed expenses could not be determined on the face of the policy. Phone records would not reveal whether the expenses were for business or personal use. Even if it could be proved that the expenses were business-related, phone records and statistical surveys would not reveal whether the business expense was necessary, whether the employer knew or had reason to know that the employee had incurred a business expense, and if so, whether the employee sought and was denied reimbursement under the exception.

These individual questions relate to whether this claim is subject to common proof. Thus, we conclude the trial court did not use improper criteria or abuse its discretion in determining this claim was not amenable to class treatment.

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[15] Appellant contends the trial court's order addressing "free services" overlooks the per se policy not to reimburse certain business expenses. Appellant, however, neglects to quote the following sentence in the order: "While many of the various extra costs potentially imposed on employees through the 'Concession Phone' program might have been necessary business expenses, none appear susceptible to common proof showing they were uniformly necessary or not amenable to reimbursement through the exception possibility."

## DISPOSITION

The trial court's order denying class certification is affirmed. No costs are awarded on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.